

Employment and Training Administration, Labor

§ 655.4

(e) *Subparts J and K of this part.* Subparts J and K of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing nonimmigrant alien students on F-visas in off-campus employment and enforcement provisions relating thereto.

[43 FR 10312, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990; 56 FR 24667, May 30, 1991; 56 FR 54738, Oct. 22, 1991; 56 FR 56875, Nov. 6, 1991; 57 FR 1337, Jan. 13, 1992; 57 FR 40989, Sept. 8, 1992; 69 FR 68226, Nov. 23, 2004]

§ 655.00 Authority of the Office of Foreign Labor Certification (OFLC) Administrator under subparts A, B, and C.

Pursuant to the regulations under this part, temporary labor certification determinations under subparts A, B, and C of this part are ordinarily made by the Office of Foreign Labor Certification (OFLC) Administrator (OFLC Administrator) of the Employment and Training Administration. The OFLC Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

[71 FR 35518, June 21, 2006]

Subpart A—Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H-2B Workers)

§ 655.1 Scope and purpose of subpart A.

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than agriculture, logging, or registered nursing.

[55 FR 50510, Dec. 6, 1990]

§ 655.2 Applications.

Application forms for certification of temporary employment of nonimmigrant aliens may be obtained from and should be filed in duplicate with the appropriate State Workforce

Agency serving the area of proposed employment.

(Approved by the Office of Management and Budget under control number 1205-0015)

(Pub. L. No. 96-511)

[33 FR 7570, May 22, 1968, as amended at 49 FR 18295, Apr. 30, 1984. Redesignated and amended at 55 FR 50510, Dec. 6, 1990; 71 FR 35518, June 21, 2006]

§ 655.3 Determinations.

(a) When received, applications for certification shall be forwarded by the State Workforce Agency to the appropriate National Processing Center, who will issue them if he or she finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) In making this finding, such matter as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered, will be considered. The policies of the United States Employment Service set forth in part 652 of this chapter and subparts B and C of this part shall be followed in making the findings.

(c) In any case in which the OFLC Administrator, Employment and Training Administration, determines after examination of all the pertinent facts before him or her that certification should not be issued, he or she shall promptly so notify the employer requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.

(d) The certification or notice of denial thereof is to be used by the employer to support its visa petition, filed with the United States Citizenship and Immigration Services of the Department of Homeland Security.

[33 FR 7570, May 22, 1968, as amended at 43 FR 10311, Mar. 10, 1978. Redesignated and amended at 55 FR 50510, Dec. 6, 1990; 71 FR 35518, 35521, June 21, 2006]

§ 655.4 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the United

§ 655.90

20 CFR Ch. V (4–1–08 Edition)

States Citizenship and Immigration Services of the Department of Homeland Security the temporary employment of nonimmigrant aliens under H-2B visas in the Territory of Guam. Pursuant to DHS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56875, Nov. 6, 1991, as amended at 71 FR 35521, June 21, 2006]

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)

SOURCE: 52 FR 20507, June 1, 1987, unless otherwise noted.

§ 655.90 Scope and purpose of subpart B.

(a) *General.* This subpart sets out the procedures established by the Secretary of Labor to acquire information sufficient to make factual determinations of: (1) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and (2) whether the employment of H-2A workers will adversely effect the wages and working conditions of workers in the U.S. similarly employed. Under the authority of the INA, the Secretary of Labor has promulgated the regulations in this subpart. This subpart sets forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers in agriculture. This subpart provides the Secretary's methodology for the two-fold determination of availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers, for particular temporary and seasonal agricultural jobs in the United States.

(b) *The statutory standard.* (1) A petitioner for H-2A workers must apply to the Secretary of Labor for a certification that, as stated in the INA:

(A) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) Section 216(b) of the INA further requires that the Secretary may not issue a certification if the conditions regarding U.S. worker availability and adverse effect are not met, and may not issue a certification if, as stated in the INA:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment . . . shall terminate on the date the H-2A workers depart for the employer's place of employment.

(3) Regarding the labor certification determination itself, section 216(c)(3) of the INA, as quoted in the following,